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Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

April 23, 1941.

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OUTLINE OF ARGUMENT.

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BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on April 14, 1941, to review a final order (R., 40) of the United States Circuit Court of Appeals for the Second Circuit, affirming (CLARK, Cir. J., dissenting) a final order in bankruptcy (R., 27-28) made by the United States District Court for the Southern District of New York (CLANCY, J.), which (so far as relevant) allowed the claim of the petitioner against National Studios, Inc., the bankrupt—the respondent here being the Trustee—, *as a general claim.* We have contended throughout that the petitioner should have been awarded priority under § 64 of the National Bankruptcy Act, as amended (52 Stat. 874); and the ultimate proposition of law to establish which we obtained a writ of certiorari is that where a retailer who is compelled by local law to collect a sales tax from his customers and hand it over to the authorities goes into bankruptcy without performing these duties, the amounts which the retailer has or should have collected from his customers is owed to the authorities *qua* tax and not *qua* debt, and hence is entitled to priority under the cited section of the National Bankruptcy Act.

The sum originally demanded as sales taxes which the bankrupt should have collected from its customers was reduced by compromise, and by stipulation at the hearing (R., 12), to $796. Of this sum the bankrupt had collected $60 only from its customers, and even this sum had not been segregated and could not be traced into the possession of the trustee (R., 12).

Opinions Below.

Four opinions are found in the Record, *viz.*, that of the Referee, that of the District Court, that of the majority of the Circuit Court of Appeals, and that of the dissenting Judge.

(i)

The Referee stated that the case presented to him in the City's proof of claim and the Trustee's objections thereto required him "to determine whether the claim of the City of New York is a claim for a tax legally due and owing by the bankrupt or whether it is a claim against the bankrupt only as a collector of such taxes" (R., 14). He then adverted to the requirement in the local law (Local Law No. 24 of 1934, set forth in Appendix A, *post*, p. 31) that every vendor is to "file with the comptroller a return of his receipts and of the taxes payable thereon" (§ 5, R., 14, 15); thereafter quoted the first paragraph of § 8, set forth *post*, p. 8; and finally cited the right to order the sheriff to make a distraint, also set forth *post*, p. 9. He concluded (R., 15):

> "These provisions of the law impose two liabilities upon the vendor: one is to collect the tax from the vendee and pay it to the City; the other liability is to pay the City the amount of the tax whether the vendor collects it or not. This latter obligation is a tax legally due and owing by the bankrupt. Such was the reasoning of the Court in *Matter of Atlas Tele-*

vision Co., Inc., 273 N. Y. 51, and since the claim of the City of New York expressly claims that the bankrupt is justly and truly indebted to it for taxes the claim is entitled to priority."

(ii)

The District Judge cited (R., 23-24) three decisions of the New York Court of Appeals on the nature of the seller's obligations under the sales tax local laws: *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936); *Matter of Merchants Refrigeration Co.* v. *Taylor*, 275 N. Y. 113, 124 (1937); and *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 (1938). From these he concluded that the sales tax local law imposes a duty on the vendor to forward collections to the City but does not impose the burden of the tax *qua* tax upon him. He also cited *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), as holding the tax was on the purchaser since it was held not to burden a seller engaged in interstate commerce.* He concluded that when the decision of this Court in *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936), was reversed *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937), upon the authority of *Matter of Atlas Television Co., supra*, this Court upheld the City's asserted priority because the bankrupt owed a debt to the City under the National Bankruptcy Act, U. S. Code, tit. 11, § 104(7) and did not owe a tax under § 104(6); so that the amendment of 1938 (52 Stat. 874) stripping debts owing to cities of any right to priority compels the City to show that vendors owe sales taxes (collected or collectible from their customers) *qua* taxes and not *qua* debts. This, he said, the City cannot do. He accordingly reversed the Referee.

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* As we show *post*, p. 18, we are not in any sense going back on the position we took at the bar of this Court in the *Berwind-White* case.

(iii)

Judge CHASE, with whom Judge SWAN concurred, held that when *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), was decided, the City had priority under state law regardless of whether its claim against a retailer was a claim for a tax or a claim for a debt (R., 37). The Circuit Court of Appeals had, prior to that decision, held that such a claim was one for a debt. *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936). This Court reversed that decision on the authority of the *Atlas* case, *sub nom. New York City* v. *Goldstein*, 299 U. S. 522 (1937). But this Court, said Judge CHASE, did not disapprove of so much of the *Lazaroff* opinion as held the claim to be a debt and not a tax, since the City, under the National Bankruptcy Act as it then stood, was entitled to prevail whichever way the claim was categorized. This was error, as we show *post*, p. 20. The Court concluded by renewing and reiterating the declarations it had made in *Matter of Lazaroff*, *supra*, as well as in *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859 (2nd Circ., 1925), that sums owed by retailers, for taxes collected or collectible from their customers, are owed *qua* debt and not *qua* tax.*

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* This narrow view of the effect to be given to this Court's reversal of the *Lazaroff* decision is at variance with the view generally entertained by federal district Judges in the Eastern and Southern Districts of New York. Prior to the amendment of the National Bankruptcy Act, § 64, district Judges had no hesitancy in describing the claim of the City of New York against retail merchants for sums collected from their customers as claims for *taxes* owing by the retailers. See for example *In re Sixty-seven Wall Street Corporation*, 23 F. Supp. 672 (S. D. N. Y., 1938). It is also true that Referees in Bankruptcy (including the Referee in the case at bar) likewise shared the view of the district Judges.

(iv)

Judge CLARK dissented, and pointed out (R., 39) that in the *Atlas* opinion the New York Court of Appeals had expressly criticized the *Lazaroff* opinion as reflecting an erroneous interpretation of New York law, and as denominating a *debt* what was really, in the judgment of the New York Court of Appeals, a *tax*.

Judge CLARK also referred (*ibid.*) to a holding in the Tenth Circuit that what the retailer owes in circumstances like those at bar is owed *qua* tax and not *qua* debt. *Barbee, Trustee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114 (10th Circ., 1939). Two law review notes to the same effect (18 N. Y. Univ. Law Q. Rev. 135; 40 Columbia L. Rev. 1241) were also cited.

Jurisdiction.

The order of the United States Circuit Court of Appeals for the Second Circuit was filed March 19, 1941. The jurisdiction of this Court is based on U. S. Code, tit. 28, § 347, subd. (a). The petition was filed in this Court March 22, 1941, and was granted April 14, 1941.

The City of New York (petitioner here) as claimant in bankruptcy made an assertion of priority in its proof of claim (R., 3), and the Trustee filed an objection (R., 4) to the asserted priority.

The issues of law thus framed were decided in favor of the contention of the petitioner by the Referee, but against that contention by the Courts, and the claim was allowed as a general claim only. See the opinions hereinbefore abstracted. The order of the Referee is at R., 16; the order of the District Court is at R., 27; the order of the Circuit Court of Appeals is at R., 40.

Statutes Involved.

1. The Enabling Act.

In 1934, the need of raising revenue to defray the costs of unemployment relief led to the passage by the Legislature of the State of New York of an Enabling Act (L. 1934, ch. 873) which authorized the City of New York to impose any tax or taxes

> "which the legislature has or would have power and authority to impose to relieve the people * * * from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer"

of the City.

We have not reprinted the Enabling Act since the case does not call for an interpretation of its language. We pass at once to the local laws adopted pursuant to it.

2. The Local Laws.

The City Sales Tax Local Law is reprinted in Appendix A, *post*, p. 31. It has been renewed annually, without any significant variations of phraseology (R., 36).

Local Law No. 20 of 1934 (erroneously numbered "21" in the compilation published at Albany), as amended by Local Law No. 24 of 1934 (erroneously numbered "25" in the cited compilation), imposes (in § 2) a tax upon "receipts from every sale in the city of New York" of "tangible personal property sold at retail", with exceptions not here relevant.

Section 2 goes on to provide:

> "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the

sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

Section 5 requires every vendor to "file with the comptroller a return of his receipts and of the taxes payable thereon" for various prescribed periods. The section also contains these words:

> "If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify."

Section 6 contains provisions in reference to security to be furnished by the vendor "to secure the payment of any tax and/or penalties due or which may become due from such vendor". We quote the section in full:

> "§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. *All taxes for the period for which a return is required to be filed shall be due from the vendor* and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety com-

pany authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to *secure the payment of any tax* and/or penalties due or which may become *due from such vendor*. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to *recover any tax* and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities." (Italics ours.)

Sections 7 and 10 provide the vendor with the remedy of certiorari where an erroneous determination of the tax is alleged to have been made by the Comptroller, or where a tax has been illegally collected and the Comptroller has failed to make a refund to the vendor. Section 7 gives drastic remedies against a vendor who has failed to file a return, even allowing the Comptroller to estimate the amount owed "on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors"—surely a harsh way of treating a mere "debtor".

Further remedies against the vendor are given by § 8, which reads in part as follows:

"§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over *any tax and/or to pay any tax* or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the *amount of the tax* and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner." (Italics ours.)

The vendor's obligation is measured either by the size of his tax collections or by 2% of his receipts from sales, whichever is greater.* His obligation is owed *qua* tax.

Moreover, where the price is below a certain figure, the Comptroller is empowered (§ 3, last sentence) to excuse the vendor from the duty of collecting from the purchaser. The figure was fixed at $0.12 by the Comptroller's Regulations

* Comptroller's Regulations, issue of December 29, 1938, p. 31.

of February 11, 1935, Art. 3. The result of this has been held to be that, on sales below this figure, the vendor's liability becomes primary, and the duty to shift the burden to the purchaser and collect from him ceases. *Queens Vending Corp.* v. *City of New York*, 94 N. Y. L. J. 318 (July 31, 1935), aff'd 246 App. Div. 594 (1st Dept., 1935). A similar result under a somewhat similar statute was reached in *Jensen Candy Co.* v. *State Tax Commission*, 90 Utah 359, 61 Pac. (2d) 629 (1936).

3. The National Bankruptcy Act.

The National Bankruptcy Act, § 64, as amended by 52 Stat. 840, 874, awards priority in bankruptcy to "*taxes legally due and owing by the bankrupt* * to the United States or any State or any subdivision thereof * * *." A provision formerly forming part of this section and awarding priority (after taxes) to "debts owing to any person who by the laws of the States or the United States is entitled to priority" was modified by striking out the words "the States or," so that it possesses no present pertinence.

Specification of Errors to be Urged.

1. We contend that it was error for the Circuit Court of Appeals to refuse to hold that when a sales tax law requires retailers to collect sales taxes from customers and forward the collections to the taxing authorities, and requires retailers to file periodic returns, and subjects them to drastic measures upon non-fulfillment of their duties, and makes them liable for the amount of the tax whether they have collected it from their customers or not, the sums collected or collectible by retailers are owed to the taxing authorities *qua* tax and not *qua* debt.

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* The italicized words have been in the National Bankruptcy Act since its original enactment in 1898 (30 Stat. 563).

2. We further contend that the Circuit Court of Appeals erred in that it either rejected the authority of, or adopted an erroneous interpretation of, decisions of the New York Courts defining as a tax the obligation of the retailer in the premises set forth in the record.

3. We further contend that it was error for the Circuit Court of Appeals to refuse to hold that "taxes legally due and owing * * * to * * * any State or any subdivision thereof," in National Bankruptcy Act § 64, as amended in 1938, should be construed to cover the obligations of the bankrupt at bar to the City of New York.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. The terms of the local laws under which the sales taxes were imposed, and the interpretation of them by the New York Court of Appeals, stamp upon the retailer's obligations the characteristics of a tax as distinguished from a mere debt. Priority in bankruptcy should accordingly have been awarded.

2. Since practical obstacles make it impossible for the taxing authorities to collect sales taxes from purchasers directly, and since such taxes must of necessity be funneled through the retail merchants, public policy favors holding the retailer's obligations, upon his bankruptcy, to be owed *qua* tax and not *qua* debt. The Chandler Act, amending § 64 of the National Bankruptcy Act, should be so construed as to give effect to this policy.

POINT I.

The terms of the local laws under which the sales taxes were imposed, and the interpretation of them by the New York Court of Appeals, stamp upon the retailer's obligations the characteristics of a tax as distinguished from a mere debt. Priority in bankruptcy should accordingly have been awarded.

1. The various provisions of the local law defining the retailer's duties regarding sales tax collections transmute his obligations from a debt into a tax.

We have analyzed the New York City Sales Tax Local Law *ante*, pages 6-10. A brief rehearsal of its salient provisions will show its capacity to transmute the obligations which the retailer owes to the City, and to take them out of the lowly category of "debt" and exalt them to the higher category of "tax".

The capacity of "reenforcements" to affect the legal attributes of an obligation was adverted to in *McDowell* v. *City of Barberton*, 38 F. (2d) 786 (6th Circ., 1930), where the Court said (p. 788):

> "But the state gave the color and standing of taxes to municipal water rents to the extent at least that it secured their collection by a possible lien upon the real estate, and we think this peculiarity should be recognized by section 64(a) of the Bankruptcy Act (11 U. S. C. A., § 104(a))."

See also *In re Otto F. Lange Co.*, 159 Fed. 586, 588 (N. D. Iowa, 1908).

Thus in § 2 it is provided that the vendor, though empowered if necessary to sue the purchaser for the tax (thus

accomplishing his own exoneration), "shall be liable for the collection" of the tax.

The vendor is required by § 5 to file periodic returns "of his receipts [from the sale of goods] and of the taxes payable thereon * * *". The Comptroller, "to insure the payment of the tax imposed by this local law" may require returns to be made for other than the normal, specified periods and upon other dates, as he may specify. Clearly "payable" and "payment" in these quotations mean, from their context, "payable by the vendor" and "payment by the vendor", and the vendor by being required to file returns, is treated as the taxpayer—with, however, a right and a duty to exonerate himself by passing the tax on to the consumer.

Section 6 goes further in removing doubt as to the nature of the vendor's obligation. It provides that at the time of filing returns, "each *vendor shall pay* to the comptroller *the taxes* imposed by this local law upon the receipts required to be included in such return." This would seem to be almost conclusive by itself. There is, moreover, additional significance in the phrases "*taxes* for the period for which a return is required to be filed *shall be due from the vendor*", and "secure [by bond] the payment of any *tax* * * * which may become due *from the vendor.*"

Sections 7 and 8 give the Comptroller harsh and drastic remedies against a vendor. These remedies are familiar remedies against taxpayers; they are not familiar remedies against mere debtors. We refer particularly to the Comptroller's right, given by § 7, to estimate the amount owed "on the basis of external indices, such as number of employees of the person concerned [*i. e.*, the vendor], rentals paid by him, his stock on hand, and/or other factors * * *"; and the right of the Comptroller, reserved in § 8, to issue, without application to any Court, a warrant directing the

sheriff "to levy upon and sell the real and personal property of the vendor * * * for the payment of the amount thereof" (*i. e.*, of the tax).

In § 12, the Comptroller is given the power to subpoena the vendor's books and records.

Correlatively, §§ 7 and 10 confer on the vendor the right to review, upon certiorari, the determination of tax liability made by the Comptroller upon the basis of the returns filed by the vendor. The Comptroller has to give notice of his determination "to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser * against whom it is assessed" applies for a certiorari order within 30 days.

2. The New York Court of Appeals has declared that what the retailer owes is owed *qua* tax. It has expressly disapproved the contrary ruling by the Circuit Court of Appeals in the *Lazaroff* case.

In *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), a proceeding conducted under the state insolvency laws, the "city of New York filed a claim for 'taxes imposed pursuant to the provisions of Local Law No. 24 of the City of New York for the year 1934'" (p. 53). In describing

* In exceptional cases the Comptroller will, under § 2, assess the tax in the first instance directly against the purchaser. This normally happens when the purchaser has resisted the vendor's efforts to collect the tax, and the latter, to escape penalties, has brought the matter to the Comptroller's attention. It happens also when a particular purchaser, who buys large quantities of an article, desires to bring a test case himself. For an illustration of this, see *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430 (1940). To cover cases of direct assessments against purchasers, the right to review by certiorari has been conferred on them in §§ 7 and 10.

how the Courts below had viewed our claim, the Court of Appeals said (p. 55):

> "The courts below, too, have assumed that the city has such a preference in the collection of taxes. Preference has been denied in this case because in the opinion of the Appellate Division the city's claim is not for taxes due to the city from the insolvent, but for moneys collected by the insolvent as agent for the city."

The Court used similar language in describing the arguments which the assignee in that case had interposed against ours, saying (pp. 55-56):

> "It is the contention of the assignee that even though the vendor of property is the person entitled to the 'receipts from every sale,' the tax is laid upon the purchaser, and that the vendor is required only to collect the tax as the collecting agent of the city and though required to pay to the city the amount of the tax, his liability is only that of an ordinary debtor."

The Court then gave a synopsis of the holding in *Matter of Lazaroff*, 84 F. (2d) 982 (2nd Circ., 1936), and said (p. 57):

> "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales. (§ 5.) The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own. Indeed the city has insisted that a vendor is liable for a tax of two per cent upon the amount of his receipts even from sales within the amount, stated in regulations promulgated by the Comptroller

> pursuant to section 3 of the local law, upon which 'no tax need be collected from the purchaser.' (*Queens Vending Corp.* v. *City of New York,* 246 App. Div. 594)."

To ignore this paragraph, as the majority below did, was a clear disregard of an applicable decision of the state Court of last resort. The dissenting Judge pointed this out (R., 39).*

The Court then proceeded to hold that taxation was an attribute of sovereignty and that the City acted as sovereign when it imposed taxes for governmental purposes (p. 57). The Court concluded (273 N. Y., at pp. 57-58):

> "From that point of view it seems clear that the city is entitled to a priority. It has imposed a tax as sovereign and to meet a need which concerns the welfare of the State. It has provided that the vendor of property must pay the tax to it. Though the vendor is required, at least in most cases, to collect the tax from the purchaser 'for and on account of the city,' the purpose of that provision is to place the incidence of the tax immediately on the consumer. The city can collect only from the vendor. The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent. It is an obligation measured by the receipts of the vendor and created by the local law."

We submit that nothing could be more firmly and dogmatically declared than that the City may demand the tax of the vendor *qua* tax.

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* Note the language of the commentator on the District Court's decision in the instant case in 18 N. Y. Univ. L. Q. Rev. 136: "The court's interpretation of the *Atlas* decision in the instant case as holding that the City received priority because the obligation was a debt entitled to priority under State law and not a tax, is contradicted by the explicit words of the opinion," citing the passage just quoted.

Judge LEHMAN, in the *Atlas Television* case, having said that "the purpose of that provision * is to place the incidence of the tax immediately on the consumer" (p. 58), the statement of CRANE, Ch.J., in *Matter of Merchants Refrigeration Corp.* v. *Taylor*, 275 N. Y. 113, 124 (1937), to wit:

> "The *Atlas Television* case (273 N. Y. 51) did not hold that the sales tax is imposed on the vendor, but only that he is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser",

must refer to the ultimate incidence of the burden of the tax, and does not diminish the duties and obligations of the vendor *vis-à-vis* the City, which are to pay over 2% of his receipts, *qua* tax and not *qua* debt. And we say the same thing of Judge LOUGHRAN'S opinion in *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938), where he said (p. 297):

> "The sales tax was not imposed on the vendor. It fell upon the purchaser * * *"

citing the *Merchants Refrigeration* opinion. He, too, like Chief Judge CRANE before him, meant that when all the duties imposed by the Sales Tax Local Law have been performed, it is the purchaser whose pocketbook has been hit, and that in consequence the vendor, in the *Kesbec* case, had no right to keep sums collected in excess of what the law required. The same thought is found in *Matter of United Autographic Register Co.* v. *McGoldrick*, 260 App. Div. 157, 161 (1st Dept., 1940), aff'd 285 N. Y., mem. p. 19 (1941). But none the less, what the vendor owes he owes *qua* tax. The dissenting Judge (CLARK, J.) agreed with us that the later decisions do not impair the authority of the *Atlas* case (R., 39).

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* The provision requiring the vendor to collect the tax from the purchaser.

All doubts on this score would seem to have been set at rest by the very recent decision of the Court of Appeals in *Matter of Brown Printing Co., Inc.*, 285 N. Y. 47 (1941), wherein upon the insolvency of a retailer, the Court of Appeals unanimously declared that the claim of the City of New York for sales taxes should share equally with a claim by the State of New York for a franchise tax, thus reiterating in strong terms their view that the obligation of a retailer was an obligation to pay a *tax* and not merely an obligation to discharge a *debt*.

The vendor has the duty of passing the burden on to the purchaser, but again we say that what the vendor pays to the City he pays *qua* tax because (1) "the amount due to the City is not measured by the amount actually collected from the purchaser, but by a percentage of the vendor's total receipts;" * and (2) the reenforcement of the City's right by the requirement that periodic returns be filed by the vendor as well as by the reservation of a right of distraint takes away from the vendor's liability the attributes of a debt and confers upon it the attributes of a tax.† Above all, ~~it is~~ certainly anomalous to classify as a debt and not a tax an obligation into the assumption of which the vendor's volition did not enter at all. *City of Rochester* v. *Bloss*, 185 N. Y. 42, 47-48 (1906). See also *New Jersey* v. *Anderson*, 203 U. S. 483, 492-493 (1906).

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 43-44 (1940), established nothing hostile to the foregoing. The tax was sustained against an assertion that it burdened interstate commerce, for the simple reason that the seller enjoyed a right, and in fact was under a duty, to pass on the tax to the purchaser. This does not mean that what the seller collected, in fruition of that right or in perform-

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* 18 N. Y. Univ. L. Q. Rev. 136, lines 3-4.
† See authorities cited *ante*, p. 12.

ance of that duty to shift the incidence, was any the less a tax and owing to the authorities as such. The use the Courts below (R., 26, 38) made of the *Berwind-White* case seems to us to involve a transgression of the principle, first uttered in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), that "general expressions, in every opinion, are to be taken in connection with the case in which the expressions are used" (p. 399).

Common elements exist between the *Berwind-White* case and another recent case, *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940). Here the State laid a percentage tax on charges for the use of safe deposit boxes. The banks were required (1) to collect the taxes from their customers, (2) to forward the collections to the State, and (3) to include them in the bills submitted to customers. The tax was held not offensive against the laws dealing with state taxes on national banks, since the banks were required to pass the burden on to their customers. In determining the incidence of the burden, this Court pursued the same course of reasoning as in the *Berwind-White* case, and said (pp. 52-53):

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by § 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax."

On the other hand, when questions of priority arise, there is no reason why the retailer may not be deemed the person by whom taxes are "legally due and owing", even though we at the same time are required by the *Colorado Bank* case to call the purchaser the taxpayer. For in applying the priority statute (National Bankruptcy Act, § 64), the important thing is to ascertain to whom the taxing authorities principally look for the sums payable under the tax statutes, since only by awarding priority upon the bankruptcy *of such persons* can the policy behind § 64 be effectuated.

Another reason why the true holding of the *Atlas Television* case must have been what we have stated above is that while the *State* of New York under state law enjoys priority whether it seeks to enforce a debt or a tax, *municipalities* under state law enjoy priority only when they are seeking to collect taxes. The sovereignty of the State, and the privileges appurtenant to sovereignty, are shared with municipalities as far as taxes are concerned but not as far as debts are concerned. See *Matter of Northern Bank of New York*, 85 Misc. 594 (1914), aff'd on opinion below 162 App. Div. 974 (1st Dept., 1914), aff'd 212 N. Y. 608 (1914). Here the City, having collected various local taxes, deposited them in a bank which later failed. Clearly the bank owed the money to its depositor *qua* debts and not *qua* taxes. Priority was, under those circumstances, denied.

3. *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859, is unsound in principle and should be disapproved.

We had assumed that after the decision of the Circuit Court of Appeals in the *Lazaroff* case (84 F. [2d] 982) had been reversed in this Court (299 U. S. 522), the case of *Nolte* v. *Hudson Navigation Co.*, 8 F. (2d) 859 (2nd Circ.,

1925), on which the Circuit Court of Appeals had rested its opinion, would be allowed to sink into what Mr. Justice HOLMES, in another connection, called "a deserved repose".* But Judge CHASE has cited it as a subsisting authority (R., 36), and we shall endeavor to give it, with all due deference, a *coup de grace.*

In the *Nolte* case, the United States filed a claim with the receiver in equity of the Company and claimed priority for the claim on the ground that it was for transportation taxes imposed by 40 Stat. 314 and 40 Stat. 1101. The general priority statute (U. S. R. S. § 3466) was regarded as inadequate to meet the situation because it covered only "debts" and not "taxes", and because an insolvent who had submitted to a consent receivership was not regarded as embraced within the phrase "insolvent [who] has made a voluntary assignment" or has committed an act of bankruptcy. Consequently, the government had to rely on U. S. R. S. § 3186 which gave it a lien for "taxes". There the government struck a snag, for as to carriers, it was merely their duty to collect the tax from travelers or shippers and pay it to the government. Hence the Court said (p. 862):

> "A tax is a pecuniary burden imposed for the support of government. The courts have said again and again that a tax is not a debt nor in the nature of a debt. It is not, as is a debt, founded on contract or agreement. It is an impost levied by authority of the government upon its citizens or subjects for the support of the state. The taxpayer is the one upon whom the pecuniary burden is imposed and whose duty it is to make payment. The burden of making payment here rests on the traveler or shipper. The duty of collecting it and then paying over the amount collected rests on the carrier it is true, but this does not make the carrier a taxpayer as distinguished from a tax collector."

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* Dissenting, in *Adkins* v. *Children's Hospital,* 261 U. S. 525, 570 (1923).

Passing over the obvious differentiating circumstance that in the *Nolte* case the Court was passing upon the rights of the United States as a creditor * and not those of a State, we venture, with deference, to offer the following criticisms of Judge ROGERS' reasoning.

(1) It draws a distinction between taxes and debts on the ground that the former are impositions *in invitum* while the latter have their origin in contract or agreement. But the duty of the carrier to transmit its collections to the government is imposed on it with as little concern for its consent as were the taxes imposed on the carrier directly. Cf. *City of Rochester* v. *Bloss, ante,* p. 18.

(2) The distinction between taxes and debts, though featured in *Meriwether* v. *Garrett,* 102 U. S. 472 (1881), a case which was not cited by the Court, is without merit as far as the policy behind § 3466 is concerned, and a few months later a decision to this effect was handed down by this Court. See *Price* v. *United States,* 269 U. S. 491, 501-502 (1926).

(3) The doctrine laid down by the Court that U. S. R. S. § 3466 was not brought into operation when a corporation filed a consent answer in an equity receivership—a doctrine which made it necessary to draw a distinction between taxes and debts—was disapproved in *Price* v. *United States, supra.*

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* An examination of the War Revenue Act of 1917 (40 Stat. 314) and of the Revenue Act of 1918 (40 Stat. 1101), under which the carriers were required to collect from passengers a tax on tickets, shows that the United States reserved to itself against carriers who failed to comply with the law radically different remedies from those the City reserved against vendors in the local laws cited *ante,* pp. 12-14. The carriers were liable to penalties, not exceeding $1000, or to imprisonment, and, in addition, to a penalty equal to twice the tax which they had omitted to collect. They were not given directly the right to review the amount of the tax by certiorari or any equivalent remedy.

Nolte v. *Hudson Navigation Co., supra,* has thus become an outmoded decision, and only a slight stretch of the principle *cessante ratione cessat quoque lex* need be made to justify this Court in declaring that it has ceased to possess any authority.

4. Ample precedents exist for holding that what the bankrupt owed to the petitioner was owed *qua* tax and not *qua* debt.

Upon facts strikingly similar to those at bar, priority was allowed to a state tax commission upon the bankruptcy of a vendor, in *Barbee, Trustee v. Oklahoma Tax Commission,* 103 F. (2d) 114 (10th Circ., 1939). The sales tax law of Oklahoma, Okla. L. 1935, ch. 66, p. 311, provided:

> "The tax levied hereunder shall be paid by the consumer and/or user to the vendor, and it shall be the duty of each and every vendor in this State to collect from the consumer or user, the full amount of the tax imposed by this Act, or an amount equal as nearly as possible and/or practicable to the average equivalent thereof.
>
> Vendors shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge, and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts."

The District Court awarded priority (23 F. Supp. 995), and the Circuit Court of Appeals affirmed, citing and following an Oklahoma decision, *In re Harris,* 184 Okla. 459, 88 Pac. (2d) 372 (1939), where the Court had said (p. 462):

> " * * * we conclude that the moneys due from the insolvent debtor are taxes and not merely an ordinary

debt owing from him as agent to the state of Oklahoma as principal." *

A number of state Courts of last resort, perceiving the necessity of making sales tax collections effective, have reached results substantially similar to the result in the *Barbee* case, under tax laws like the one at bar. See *e. g.*, *DeAryan v. Akers*, 12 Cal. (2d) 781, 87 Pac. (2d) 695 (1939), certiorari denied 308 U. S. 581 (1939); *State ex rel. Foster* v. *Miller*, 136 Ohio St. 295, 303, 25 N. E. (2d) 686 (1940); *In re Harris*, 184 Okla. 459, 462, 88 Pac. (2d) 372 (1939); *State Tax Commission* v. *Spanish Fork*, 99 Utah , 100 Pac. (2d) 575 (1940).

In *Doby* v. *State Tax Commission, supra*, the Court said (p. 153):

> "The retailer is the 'taxpayer', the person liable to the state for the tax. He is the person required to take out the license under [Ala. Acts 1936-37, p. 125] section 3, the person required to make returns and pay the tax to the State Tax Commission under sections 5 and 6; the person required to keep records under section 8; the person on whose personal property a lien is declared as security for the tax under section 9."

In *DeAryan* v. *Akers, supra*, the Court held that the seller was the person on whom a tax obligation was imposed in spite of the fact that the statute contained a proviso to the effect that the "tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done" (p. 784).

It may be said, in summary, that the process in the course of which the City's claim against the bankrupt

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* The Supreme Court of Oklahoma cited and followed *Matter of Atlas Television Co., supra*, and *Matter of Rockaway Paint Centre*, 249 App. Div. (N. Y.) 66 (2nd Dept., 1936).

retailer arose, is and remains a process of tax collection, until the purchasers' pennies are safely in the public treasury. The collections should preserve until that moment the character they had when the purchaser first placed them on the counter. Any other view would render ineffective the aid to the public authorities which was the original objective back of § 64, and which remained so after the 1938 amendment (see *post*, pp. 27-28).

5. To grant the City the claimed priority would not contravene anything said by this Court in *New Jersey* v. *Anderson*.

We are not unmindful of the statement in *New Jersey* v. *Anderson*, 203 U. S. 483, 491 (1906) that a State "cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact". But that language, in actual practice, seems to have been treated as merely a *caveat* against preposterous and unrealistic definitions; and a recent commentator has said (40 Columbia L. Rev. 1243):

> "Despite this declaration that the federal courts are to make the ultimate decision, the courts have followed almost without question the interpretations of the state courts and the language of the state statutes. No bankruptcy case has been found in which a federal court has disagreed with the terminology applied to a particular levy by a state court or disregarded the terms in which the state legislature describes the exaction."

Surely had this Court been disposed to feel any doubt as to the reasonableness of the *Atlas* decision and its capacity to bind federal Courts sitting in New York, it would not have pursued the extraordinary course of reversing the Circuit

Court of Appeals without hearing argument, as it did in *New York City* v. *Goldstein, supra.*

It is hardly necessary to add that since the decision in *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), the caveat quoted from *New Jersey* v. *Anderson, supra,* is one whose authority is on the wane.

POINT II.

Since practical obstacles make it impossible for the taxing authorities to collect sales taxes from purchasers directly, and since such taxes must of necessity be funneled through the retail merchants, public policy favors holding the retailer's obligations, upon his bankruptcy, to be owed *qua* tax and not *qua* debt. The Chandler Act, amending § 64 of the National Bankruptcy Act, should be so construed as to give effect to this policy.

(1)

Sales taxes as an emergency revenue measure have been imposed by legislation in 20 States. The trend away from *ad valorem* taxes, as sources of state revenue, to other kinds of taxes has been recognized by this Court. *Superior Bath House Co.* v. *McCarroll,* 312 U. S. ____, 61 Sup. Ct. 503, 505 (Feb. 3, 1941, Cal. No. 180). The amount of a sales tax is, in a majority of the transactions taxed, measured in pennies. To proceed against the purchaser and to require him to make a return is impracticable, and would cost in administration more than the taxes would bring in in revenue. Sales taxes can only be efficiently collected if they are funneled through retailers, and obligations of a drastic character imposed upon them. Cf. JACOBY, *Retail Sales Taxation* (1938), p. 100. The local law at bar follows this

course. To construe the local law in such a way as to reduce the retailer's obligation from an obligation to pay a *tax* to a mere duty to pay a *debt*, with the consequence that the taxing authorities are deprived of a preference in bankruptcy, is to impose a very serious obstacle in the way of tax collections, and to bring about a very serious diminution of state and municipal revenues. The taxes were imposed to meet an emergency. The local authorities have decided to renew the tax annually on the ground that the emergency has not passed.* The decision below contravenes the public interest so patently that it should not be allowed to stand.

(2)

The decision below leads to a curious result. The sales tax, as we have shown, is a consumers' tax, the vendor being (with minor exceptions not here material) forbidden to absorb it. These provisions were inserted by the local legislative body in order to make the public conscious of what unemployment relief was costing the community. If the City had made the tax a vendors' tax—a shift in design which would not have affected the revenue raised but only the extent of the public awareness that the tax had been imposed—the City's priority would have been indisputable. To make a loss of priority the consequence of the City's desire to make the public tax-conscious would be to bring about, in large measure, the defeat of the policy behind § 64—especially as no less than twenty States† have imposed sales taxes which, like the one at bar, are consumers' taxes.

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* Proof that an emergency still exists in New York is found in the titles of two Acts signed by Governor LEHMAN on March 20, 1941. New York Laws of 1941, ch. 135 and ch. 137.

† A list of the statutes of these twenty States will be found in Appendix B, *post*, p. 50.

(3)

In 1934, Congress tried to come to the relief of municipalities by enabling them to file petitions in bankruptcy. Act of May 24, 1934, 48 Stat. 708. The statute was, to be sure, held unconstitutional in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513 (1936). As amended by the Act of August 16, 1937, 50 Stat. 653, however, the legislation was upheld. *United States* v. *Bekins*, 304 U. S. 27 (April 25, 1938).

It would convict the members of Congress of singular ineptitude if, after having exhibited such persistence in their effort to relieve municipalities, they were deemed (in the Act of June 22, 1938, 52 Stat. 874, passed less than two months after success had crowned their efforts) to have placed municipalities under the handicap of enjoying a less extensive priority in enforcing tax claims in bankruptcy than had previously been theirs. A holding that *New York City* v. *Goldstein*, 299 U. S. 522 (1937), has ceased to be authoritative since the passage of the Act of June 22, 1938, is therefore, a result to be avoided.

The debates, moreover, also implement what we have just stated. Congress in the debates on the bill which later became the Act of August 16, 1937, showed (81 Cong. Rec., part 6, p. 6313) an awareness of the impotence of the taxing power of the average municipality to afford adequate relief in times of emergency. In later amending this Act by the Act of June 22, 1938 (52 Stat. 840, at p. 940), which is the very Act by which the priority section was amended (see *supra*, p. 10), they cannot have intended to effect a deliberate impairment of the already inadequate taxing power by making tax collections in bankruptcy more difficult.

We may further reenforce our argument by pointing to the circumstance that before the adoption of the 1938 amend-

ment, legislation had been adopted not only in New York City but in approximately 19 States, providing for retail sales taxes and imposing upon vendors the duty to collect the taxes from customers and transmit them to the authorities. While judicial decisions that what a vendor owed under these circumstances he owed *qua* tax, had, prior to 1938, been handed down in only two States, *Doby* v. *State Tax Commission*, 234 Ala. 150, 153, 174 So. 233 (1937), and *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), which was followed in *New York City* v. *Goldstein*, 299 U. S. 522 (1937), yet it is not too much to say that the respective legislatures probably assumed that such would be the ultimate holding of the Courts—an assumption which has been borne out by the cases cited *supra*, pp. 23-24, and of which there is every reason to suppose that Congress was aware.

Conclusion.

The order of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to allow the asserted priority.

New York, N. Y., April 23, 1941.

Respectfully submitted,

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APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24 *

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.

2. Imposition of tax.

* Erroneously numbered "25" in the compilation published at Albany.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for comsumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

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* See footnote, *ante*, p. 34.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of

taxes by a vendor shall, as far as practicable, equal two per centum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive.* If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

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* See footnote, *ante*, p. 34.

Appendix A

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when

filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer

or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned and unsatisfied.

§ 9. **Notices and limitations of time.** Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person

upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. **Administration of oaths and compelling testimony.** The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

Appendix A

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of registration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return,

certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the

custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

The following state statutes had, prior to June 22, 1938, the date of the enactment of the Chandler Act, established sales taxes substantially similar to the tax at bar and requiring the retailer to collect the tax from the purchaser:

Alabama	L. 1936-37 (Extra Session), p. 125
Arkansas	L. 1935, Act 233
Kansas	L. 1937, ch. 374
Kentucky	L. 1934, Special Session, ch. 25
Louisiana	L. 1936, Act 75
Mississippi	L. 1934, ch. 119 as amended by L. 1936, ch. 155
Missouri	L. 1937, p. 552
North Carolina	L. 1933, ch. 445
North Dakota	L. 1935, ch. 276
Ohio	L. 1934, part 2, p. 306
Oklahoma	L. 1935, p. 308
South Dakota	L. 1935, ch. 205
Utah	L. 1933, ch. 63
Washington	L. 1935, ch. 180
West Virginia	L. 1933, ch. 66
Wyoming	L. 1935, ch. 74

The following state statutes provide that the retailer must collect the tax from the purchaser "in so far as the same could be done" and forbid the retailer to advertise that he was absorbing the tax:

Colorado	L. 1935, ch. 189
Iowa	L. 1934, ch. 82

The following state statutes allow the retailer to reimburse himself by adding the tax to the sales price, but forbid him to advertise that the tax had been absorbed:

Arizona	L. 1935, ch. 77
Michigan	L. 1933, ch. 167
New Mexico	L. 1935, ch. 73, as amended by L. 1937, ch. 192

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